

Can A Breaker Be Broken?

Reasonable Accommodations & Lease Break Fees

THS clients often ask for our assistance to evaluate reasonable accommodation requests. The demand for reasonable accommodation legal assistance is so high that we are developing a cloud to handle these requests. No one knows better than us that reasonable accommodation requests come in all shapes and sizes. By now, you should know that you never deny a request without fully evaluating the request. You may be tempted to break this rule when a tenant requests to break their lease because of a disability. “This can’t possibly be a legitimate request, can it”? Surprisingly, it often is. Accordingly, a disabled tenant’s request for you to waive their lease break fees should be granted in some cases. Like all requests for a reasonable accommodation, whether you should grant a request for lease break fees to be waived depends on the facts and circumstances of each case.

Generally, tenants ask for lease break waivers in three situations. The tenant becomes disabled, the tenant’s existing disability has become more severe, or the tenant wants to use a request for a reasonable accommodation as an excuse to get out of their lease. In all cases, the tenant contends that the tenant can no longer use and enjoy the premises on the same basis as a non-disabled tenant. Sometimes requests to waive the lease break fee are made by tenants who are clearly disabled or who have previously been granted other reasonable accommodation requests, and sometimes they are made by tenants without obvious disabilities or reasonable accommodation history. There are many factual permutations to requests to waive lease break fees based on disability-related needs.

Regardless of the facts, you should handle a tenant’s request for their lease break fees to be waived like any other request for a reasonable accommodation. You should first determine if the tenant is disabled. If the tenant is not disabled, as defined by the fair housing laws, the tenant is not entitled to a reasonable accommodation. You do not have to waive lease break fees for any tenant that is not disabled. Based on client inquiries, disability is rarely at issue. Thus, in the requests that we see, the tenant usually is disabled as defined by fair housing laws, i.e. has mental or physical impairment that substantially limits a major life activity.

What is usually at issue is need. Does the tenant have a disability-related need to have the lease break fees waived? When a disabled tenant requests you to waive lease break fees, the tenant must also prove that this request is “necessary” because of their disability. The tenant must show a direct nexus (connection) between the requested accommodation and the tenant’s disability. According to the HUD/DOJ Reasonable Accommodation Guidelines, to show that a requested accommodation may be necessary, there must be an identifiable relationship, or nexus, between the requested accommodation and the individual’s disability. If there is no link between your lease break policy and a tenant’s disability, you have no obligation to make a reasonable accommodation by waiving lease break fees. Sounds great. But applying the “necessity” test to a real-world reasonable accommodation request for lease break fees to be waived can be difficult.

In applying the test, you should consider whether the disabled tenant has provided you with any information that demonstrates that the accommodation request (waiver of the lease

break fees) is necessary in any way to assist the disabled tenant in dealing with the tenant's disability. Would granting the request in any way mitigate the difficulties associated with the tenant's disability? Has the disabled tenant shown that if the lease break fees aren't waived, the tenant would likely be denied an equal opportunity to enjoy the full benefit of the tenant's rented premises? Will a waiver of the lease break fee affirmatively enhance the disabled tenant's quality of life by lessening the effects of the tenant's disability?

Applying the necessity test to real-world requests illustrates when requests should be granted and requests that can be properly denied. An elderly tenant's son informs you that the tenant has Alzheimer's, and is going to be relocated to an assisted living facility. The son requests that the community waive the lease break fees. In this scenario, a waiver of the lease break fee is likely to affirmatively enhance the disabled tenant's quality of life by lessening the effects of the tenant's disability. Arguably, the tenant's disability would make it impossible for him to use and enjoy the premises. We would recommend waiving the fees.

A tenant relocates to Denver from somewhere. The tenant has never had asthma problems. Within weeks the tenant develops severe asthmatic symptoms. The tenant's doctor writes you a letter stating that the Colorado climate is responsible for the tenant's asthmatic symptoms, and the tenant needs to move back to somewhere immediately. If the tenant relocated, the tenant's disability would be lessened. We would recommend waiving the lease break fees. However, you could condition granting of the request upon receipt of adequate documentation demonstrating that the tenant actually intends to move from Colorado back to somewhere.

A third-floor tenant's hip degenerates requiring hip replacement surgery. The tenant can no longer climb the stairs without agonizing pain. The tenant asks for the lease break fees to be waived. If you offer to relocate the tenant to a ground floor unit, but the tenant refuses, you would not have to waive the fees. If you do offer to relocate, and your community charges relocation or other fees, you should waive these fees because the move was necessitated by the tenant's disability. If you do not offer to relocate or have no available units, the safer course of action would be to waive any lease break fees.

A tenant suffers from severe depression. The depressed tenant loses his job because of the tenant's depression. The depressed tenant cannot pay the rent. The tenant wants out of his lease because he is going to move back home. The tenant wants to break his lease, and for you to waive all lease break fees. Generally, this type of request could be denied. The tenant is probably going to be just as depressed at home. What the tenant has really asked for is an accommodation to his financial circumstances. You have no obligation to accommodate a tenant's financial circumstances. If a disabled tenant who asks to be let out of his lease will be in the same adverse circumstances regardless of where he lives, this is a strong indication that the requested accommodation is not necessary, and may be, or probably is a request for a financial accommodation.

In evaluating any request for an accommodation, you must have all of the facts to make an informed decision. The outcome of the depressed tenant's case could change if the facts are different. For example, the depressed tenant's doctor informs you that the tenant needs to relocate to a mental health facility to be placed on suicide watch. Frequently, no single fact will

determine whether the request should be granted. But an important part of any analysis is determining the direct benefit to the disabled tenant. If you waive the lease break fees, will this directly help the disabled tenant cope with their disability?

Many commentators take the position that requests to have lease break fees waived are always requests for an accommodation to financial circumstances. This is true in most circumstances. However, at least one court has ruled that circumstances may exist justifying the waiver of lease break fees as a reasonable accommodation. Thus, arbitrarily or routinely denying a lease break waiver request is risky. Risk analysis is a mandatory consideration in all reasonable accommodation requests. In close cases, risk analysis dictates that accommodations should be granted. It makes no financial sense to insist on collecting \$3,500 in lease break fees at the cost of having to spend \$20,000 defending a federal court fair housing discrimination suit.

Assuming that a tenant is disabled and needs the lease break fees waived, the waiver of lease break fees must also be reasonable. Courts have set forth some key factors, among others, they will consider when determining whether the waiver of fees for disabled tenants is reasonable. Courts will look at the amount of fees imposed, the relationship between the amount of fees and the overall housing cost, the proportion of other tenants paying such fees, the importance of the fees to the landlord's overall revenues, and the importance of the fee waiver to the disabled tenant. Based partially on this test, a court would be more likely to hold that it would be reasonable for large owners and management companies to waive lease break fees.

Evaluating reasonable accommodation requests is not an exact science, and never will be because reasonable accommodation requests turn on the facts and circumstances of each request. Problems in evaluating lease break waiver requests are more likely to result when you don't have sufficient information to evaluate the request. If you deny a request for waiver of lease break fees, you should always inform the tenant in writing of your understanding of the factual basis for the request, and why the request has been denied. For example, the tenant hasn't provided sufficient, or any information regarding why a waiver of the lease break fee will affirmatively enhance the disabled tenant's quality of life by lessening the effects of the tenant's disability. Finally, when denying a request, you should always inform the tenant that you are open to further discussion of the issue, and would promptly consider any additional information that the tenant provides.